

MAR 26 2009

Docket No.: 2328-053

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of

Tuqiang NI *et al.*

U.S. Patent Application No. 09/821,753

Filed: March 30, 2001

Confirmation No. 5171

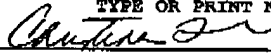
Group Art Unit: 1763

Examiner: Luz L. Alejandro Mulero

For: PLASMA PROCESSING METHOD AND APPARATUS WITH CONTROL OF
PLASMA EXCITATION POWER**APPELLANTS' MOTION TO STRIKE MARCH 18, 2009 COMMUNICATION
ENTITLED RESPONSE TO ARGUMENTS**Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450CERTIFICATION OF FACSIMILE TRANSMITTAL
I HEREBY CERTIFY THAT THIS PAPER IS BEING FACSIMILE TRANSMITTED TO THE
U.S. PATENT AND TRADEMARK OFFICE ON THE DATE SHOWN BELOW

Christina Frye

TYPE OR PRINT NAME OF PERSON SIGNING CERTIFICATION



SIGNATURE

March 26, 2009

DATE

(571) 273-8300

FACSIMILE NUMBER

Sir:

The Patent and Trademark Office sent attorney for appellants a communication entitled "Response to Arguments" on March 18, 2009. This communication is stated to be in response to appellants' January 13, 2009 reply brief.

Appellants submit this motion to strike the March 18, 2009 communication because the communication does not comply with 37 CFR 41.43, entitled "Examiner's Response to Reply Brief" or MPEP Section 1207.05 entitled "Supplemental Examiner's Answer."

37 CFR 41.43 requires the primary examiner to acknowledge receipt and entry of the reply brief. Because the primary examiner has not acknowledged entry of the reply brief and has not formally acknowledged receipt thereof, the requirements of 37 CFR 41.43 have not been met. In addition, there is no provision in the Rules of Practice or ~~the MPEP for the primary examiner to reply to an appellants' reply brief by a paper~~ entitled "Response to Arguments."

MPEP Section 1207.05 states: "Every supplemental examiner's answer must be approved by a Technology Center (TC) Director or designee." The March 18, 2009 communication was electronically signed by the primary examiner. It contains no

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indication of approval by a Technology Center Director or designee. Consequently, the March 18, 2009 communication fails to comply with MPEP Section 1207.05 and therefore is fatally defective.

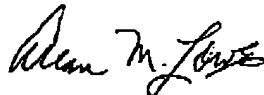
MPEP Section 1207.051. states: "In response to a reply brief filed in compliance with 37 CFR 41.41, the primary examiner may: (A) withdraw the final rejection and reopen prosecution (see MPEP Section 1207.04); or (B) provide a supplemental examiner's answer responding to any new issue raised in the reply brief. The examiner can not issue a supplemental examiner's answer if the reply brief raised no new issue." The March 18, 2009 communication (1) makes no allegation of appellants' reply brief raising a new issue and (2) does not include a withdrawal of the final rejection and reopening of prosecution. In fact, the reply brief does not raise new issues; it points out inadequacies in the examiner's answer and why there are incorrect rationales in the answer for (1) the new ground of rejection and (2) the new arguments raised in the answer. An example of the inadequacy in the answer is the failure to consider claim 59. This is another reason why the March 18, 2009 communication fails to comply with MPEP Section 1207.05 and is fatally defective.

Granting of the motion is in order.

Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 07-1337 and please credit any excess fees to such deposit account.

Respectfully submitted,

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